Village Red Restaurant Corp. d/b/a Waverly Restaurant *and* Miguel Romero Lara *and* Miguel Botello Gonzaga. Cases 02–CA–162509 and 02–CA–166015

March 20, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND EMANUEL

On October 31, 2016, Administrative Law Judge Steven Davis issued the attached decision. The General Counsel filed exceptions, along with supporting arguments.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] to amend his remedy, and to adopt the recommended Order as modified and set forth in full below.[3]

[1] The Respondent has not filed exceptions. In the absence of exceptions, we adopt the judge's findings that the Respondent violated Sec. 8(a)(1) by discharging or constructively discharging employees Justino Garcia, Miguel Romero Lara, Jesus Delgado, and Miguel Botello Gonzaga because they filed a Fair Labor Standards Act (FLSA) lawsuit against the Respondent, violated Sec. 8(a)(1) and (4) by constructively discharging Gonzaga because he also filed an unfair labor practice charge with the Board, and violated Sec. 8(a)(1) by threatening Gonzaga with discharge for filing the FLSA suit and the Board charge.

Further, we find merit to the General Counsel's exceptions, to which the Respondent has not filed any response. We agree with the General Counsel that, in addition to the discriminatory discharges, the judge found that the Respondent discriminatorily reduced the hours of work of the four above-named employees and that the Conclusions of Law should be amended accordingly. We further agree with the conforming changes to the language of the judge's Conclusions of Law and recommended Order urged by the General Counsel, which clarify the Respondent's principal location and that Gonzaga was constructively discharged.

We shall also modify the judge's Conclusions of Law to make clear that, as the General Counsel's exceptions point out, Gonzaga was constructively discharged twice. In his decision, the judge plainly found that Gonzaga was forced to quit by the reduction in work hours imposed by the Respondent because of his participation in the FLSA lawsuit. The judge also found that, after Gonzaga was subsequently asked to and did return to work about a month following this initial constructive discharge, he was constructively discharged a second time when he was told to withdraw his Board charge if he wished to maintain his employment. We shall amend the Conclusions of Law accordingly.

[2] As noted above, we shall amend the judge's Conclusions of Law to conform to the violations found by the judge.

[3] We shall modify the judge's recommended Order to conform to his unfair labor practice findings and in accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), and the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified.

AMENDED CONCLUSIONS OF LAW

1. The Respondent, Village Red Restaurant Corp. d/b/a/ Waverly Restaurant, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act by discharging Justino Garcia because he filed a Fair Labor Standards Act lawsuit against the Respondent.

3. The Respondent violated Section 8(a)(1) of the Act by constructively discharging Miguel Romero Lara, Jesus Delgado, and Miguel Botello Gonzaga because they filed a Fair Labor Standards Act lawsuit against the Respondent.

4. The Respondent violated Sections 8(a)(1) and 8(a)(4) of the Act by constructively discharging Miguel Botello Gonzaga a second time because he filed a charge with the National Labor Relations Board against the Respondent.

5. The Respondent violated Section 8(a)(1) of the Act by threatening Miguel Botello Gonzaga with discharge if he did not withdraw the Fair Labor Standards Act lawsuit he filed or if he did not withdraw the charge that he filed with the Board.

6. The Respondent violated Section 8(a)(1) of the Act by reducing the hours of work of Justino Garcia, Miguel Romero Lara, Jesus Delgado, and Miguel Botello Gonzaga because they filed a Fair Labor Standards Act lawsuit against the Respondent.

7. The unfair labor practices set forth above affect commerce within the meaning Section 2(6) and (7) of the Act.

AMENDED REMEDY

We amend the judge's remedy as follows. Backpay resulting from the discharge and/or constructive discharge of Justino Garcia, Miguel Romero Lara, Jesus Delgado, and Miguel Botello Gonzaga shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Backpay resulting from the Respondent's reduction of their hours shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. The *Ogle Protection* formula applies where the Board is remedying a "violation of the Act which does not involve cessation of employment status or interim earnings that

would in the course of time reduce backpay." *Ogle Protection Service*, supra at 683; see also *Pepsi America, Inc.*, 339 NLRB 986, 986 fn. 2 (2003).

ORDER

The National Labor Relations Board orders that the Respondent, Village Red Restaurant Corp. d/b/a Waverly Restaurant, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging and/or constructively discharging employees because they file a lawsuit pursuant to the Fair Labor Standards Act or engage in other protected concerted activities, or because they file a charge with the National Labor Relations Board.

(b) Threatening its employees with discharge if they do not withdraw a lawsuit they filed pursuant to the Fair Labor Standards Act or if they do not withdraw a charge they filed with the Board.

(c) Reducing employees' work hours because they file a lawsuit pursuant to the Fair Labor Standards Act or engage in other protected concerted activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Justino Garcia, Miguel Romero Lara, Jesus Delgado, and Miguel Botello Gonzaga full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Justino Garcia, Miguel Romero Lara, Jesus Delgado, and Miguel Botello Gonzaga whole for any loss of earnings and other benefits suffered as a result of their discharge or constructive discharge, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Make Justino Garcia, Miguel Romero Lara, Jesus Delgado, and Miguel Botello Gonzaga whole for any loss of earnings and other benefits suffered as a result of the unlawful reduction of their work hours, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(d) Compensate Justino Garcia, Miguel Romero Lara, Jesus Delgado, and Miguel Botello Gonzaga for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges and/or constructive discharges, and within 3 days thereafter notify Justino Garcia, Miguel Romero Lara, Jesus Delgado, and Miguel Botello Gonzaga in writing that this has been done and that their discharges and/or constructive discharges will not be used against them in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its New York, New York facility copies of the attached notice marked "Appendix."[4] Copies of the notice, in English and in Spanish, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 7, 2015.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. March 20, 2018

Mark Gaston Pearce, Member

Lauren McFerran, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or constructively discharge you because you file a lawsuit pursuant to the Fair Labor Standards Act or engage in other protected concerted activities, or because you file a charge with the National Labor Relations Board.

WE WILL NOT threaten you with discharge if you do not withdraw a lawsuit you filed pursuant to the Fair Labor Standards Act or if you do not withdraw a charge you filed with the National Labor Relations Board.

WE WILL NOT reduce your work hours because you file a lawsuit pursuant to the Fair Labor Standards Act or engage in other protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Justino Garcia, Miguel Romero Lara, Jesus Delgado, and Miguel Botello Gonzaga full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Justino Garcia, Miguel Romero Lara, Jesus Delgado, and Miguel Botello Gonzaga whole for any loss of earnings and other benefits resulting from their discharge or constructive discharge, less any net interim earnings, plus interest, and WE WILL also make such employees whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL make Justino Garcia, Miguel Romero Lara, Jesus Delgado, and Miguel Botello Gonzaga whole for any loss of earnings and other benefits suffered as a result of our unlawful reduction in their hours of work, plus interest.

WE WILL compensate Justino Garcia, Miguel Romero Lara, Jesus Delgado, and Miguel Botello Gonzaga for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges and/or constructive discharges of Justino Garcia, Miguel Romero Lara, Jesus Delgado, and Miguel Botello Gonzaga, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges and/or constructive discharges will not be used against them in any way.

VILLAGE RED RESTAURANT CORP. D/B/A WAVERLY RESTAURANT

The Board's decision can be found at http://www.nlrb.gov/case/02-CA-162509 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Julie R. Ulmet and *Matthew Murtagh, Esqs.,* for the General Counsel.
Louis Pechman and *Vivianna Morales, Esqs. (Pechman Law Group, PLLC),* of New York, New York, for the Charging Parties.
John Mitchell and *Arthur Forman, Esqs. (Mitchell & Incantalupo, Esqs.),* of Forest Hills, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on a charge filed by Miguel Romero Lara, an Individual, in Case No. 02–CA–162509, and based on a charge filed by Miguel Botello Gonzaga, an Individual, in Case No. 02–CA–166015, a complaint was issued on March 31, 2016, against Village Red Restaurant d/b/a Waverly Restaurant (Respondent or Employer).

The complaint, as amended, alleges that the Respondent reduced the hours and/or pay of Lara, Gonzaga, Jesus Delgado, and Justino Garcia because they engaged in concerted activities by filing and maintaining a federal law suit against the Respondent.

The complaint alleges by engaging in such conduct, the Respondent caused the termination of Gonzaga's employment in violation of Section 8(a)(1) of the Act, and following his return to work, discharged him because he filed a charge or gave testimony under the Act in violation of Section 8(a)(4) of the Act.

The complaint also alleges that the Respondent discharged Garcia, and further alleges that by reducing the hours and/or pay of Lara and Delgado, the Respondent caused their discharge in violation of Section 8(a)(1) of the Act.

Further, the complaint alleges that the Respondent by its owner and Manager Nicholas Serafis, threatened and/or impliedly threatened an employee with discharge. Finally, the complaint alleges that Serafis gave an employee the choice between cooperating with the Board in the investigation of a charge or terminating his employment.

The Respondent's answer denied the material allegations of the complaint and on July 6, 7, and 11, 2016, a hearing was held before me in New York, New York. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation operating a restaurant, having its office and placed of business at 385 6th Avenue, New York, New York, has been engaged in providing food and beverage service to members of the public. Annually, in the conduct of its operations, the Respondent has derived gross revenues in excess of $500,000, and has purchased and received at its New York location, goods valued in excess of $5000 from other enterprises such as Discoll Foods and Zeze Food Corp., located in New York State, each of which having received those goods directly from points outside New York State.

The Respondent admits and I find that it is and has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE FACTS

A. Background

The Employer operates a restaurant in Manhattan. Its admitted supervisors are its owner Nicholas Serafis and its Manager John Captan.

The restaurant employs waiters, busboys, deliverymen, chefs, a chef's helper, grill men and dishwashers, all of whom receive a salary. In addition to their salaries, the waiters, busboys, deliverymen and the dishwashers, who occasionally make deliveries of food, receive tips from customers.

B. The FLSA Lawsuit

Prior to the filing of an FLSA lawsuit the workers did not receive overtime pay which was required to be paid for hours worked over 40 per week.

On August 11, 2015, Lara, Gonzaga, Delgado and Garcia filed a lawsuit in federal court which alleged that they had not been paid the proper amount of minimum and overtime wages, and other monies pursuant to the Fair Labor Standards Act (FLSA) and the New York Labor Law. Four other employees of the restaurant were plaintiffs in the lawsuit. They have not been alleged as discriminatees here.

C. The Payroll System

Captan testified that the payroll system used prior to January 1, 2016, consisted of three parts:

First, the employees punch a timeclock to record when they arrive and leave work. However, he conceded that the times recorded by the punches were not accurate because often the employees forgot to punch in and, later in the day, when they remembered that they had not punched in they did so.

Second, Captan records the employees' days and hours of work on a Guest Check. He then compares the timecards to the Guest Check and then discards the Guest Check. Although he stated that the Guest Checks are the most accurate record of employees' time, he discards them.

Third, Captan records in a "Red Book," Respondent's Exhibit 1, the names of the employees, and the numbers of days they work at which position, for example 4 days as a waiter, 1 day as a counterman. This book is quite confusing and not easily decipherable. After an employee leaves his employment, Captan erases that name and inserts the name of the new employee on top. Therefore his interpretation of the recorded names is based on his memory of whose name, in this case the alleged discriminates, were erased below the name of the employee who replaced him.[1]

Captan used his payroll book to testify concerning the hours of work of employees following the filing of the lawsuit. On January 1, 2016, the Respondent used a payroll company to keep the time records of the employees.

[1] Hereafter, alleged discriminatees Garcia, Lara, Delgado, and Gonzaga will be referred to as the "four employees."

D. The Employees

1. Justino Garcia

Garcia was employed by the Respondent for 28 years—20 years as a waiter.

During his years of service before the lawsuit was filed, Garcia worked an average of 11.8 hours per day during his 6-day work week. His total weekly hours were about 72.

Captan testified with the aid of the Red Book, that in the first half of 2015, Garcia's regular schedule consisted of 6 days per week or 72 hours per week.

For his 72-hours-per-week work, Garcia was paid $120 per week in salary by the Respondent. His tips varied depending on the day. Earlier in the week his tips were between $120 and $150 per day, and on Saturday and Sunday he received between $220 and $230 per day in tips. His total tips were about $960 to $1010 per week.

Thus, Garcia's total wages and tips were thus about $1,080 to $1,130 per week prior to the filing of the lawsuit.

Garcia stated that about 2 weeks after the lawsuit was filed, Captan told him that his work schedule and his pay were "going to be different." His new schedule was reduced from 72 hours per week to 50 hours. Garcia testified that when he was advised of the new schedule he agreed, said "ok," and did not complain and was "happy" with the arrangement. However, Garcia testified that he was not happy with the reduction in hours but that he had to keep working in order to support his family and pay his bills.

Garcia worked that new schedule for about 5 to 6 weeks until the end of his employment. Under the new schedule, his salary was increased from $120 per week to $240 per week. The tips he received averaged $760 to 820 per week.

Thus, Garcia's total wages and tips averaged $1000 to $1060 per week 2 weeks after the lawsuit was filed.

Thus, Garcia worked about 20 hours less following the filing of the lawsuit. However his total pay remained about the same or only $100 less following the lawsuit. This was due to his increase in salary, from $120 per week to $240 per week following the filing of the suit, and also due to the reduction in tips, from about $1000 per week to $800 per week.

Garcia testified that about 1 month later, in late September, Captan spoke to him alone, advising that their conversation should be kept between them and that Serifas was not aware of it. Captan told Garcia that the people who filed the lawsuit "didn't know what we were doing" and that he (Garcia) should "drop the lawsuit."

Garcia refused to withdraw the suit. Captan told him that "it would be worth it." Garcia replied that he was already involved in the suit and would continue his participation in it.

Captan responded that, according to his attorneys, the plaintiffs would be awarded no more than $30,000. Of that sum, Captan told him, $10,000 would be awarded to the plaintiffs' attorneys as legal fees, $20,000 would go "to the court and taxes", and the plaintiffs would receive only $1000 each.

Garcia replied that was "not a problem." Captan persisted, telling him "why don't you drop the lawsuit because the money that we're going to make, $3,000 to $4,000" would be paid by the boss in 3 or 4 years. Garcia responded that all the plaintiffs intended to pursue the lawsuit.

Captan persisted further telling Garcia that "if you leave this case I will talk to the boss to give $6,000 to each of us and then we will save a headache. And then we can keep working as if nothing happened." Garcia refused. Captan asked him to think about it and inquired as to how much money the attorneys were "fighting for? Will it be worth it?" Garcia said that he did not know. Captan asked him to find out and also asked when he would learn the answer. Garcia said that he would provide an answer in about 1 week.

Garcia stated that about 10 days later, he told Captan that he did not know how much his attorneys were "fighting for" and relayed their advice to Captan that if he wanted to know he should call them. Garcia offered Captan the attorneys' business card which he refused to take.

Garcia stated that on about October 10, at the end of the work week on a Saturday, Serafis told Garcia "don't come to work on Sunday and Monday." Garcia did not report to work the next 2 days.

Captan called Garcia on Monday, advising that his schedule was changed so that he would work only Tuesday through Thursday. His hours were also changed.

Thus, Garcia had previously worked 6 days per week. However, this change resulted in his being assigned to work only 3 days per week. His weekly work hours were also reduced to 33 hours.

Garcia's salary of $240 per week remained the same as in the first schedule change. However, because of the reduction in hours, his tips were reduced to $480 to $520 per week.

Garcia returned to work on his next scheduled workday, Tuesday, October 13. He did not work the schedule given to him 3 days before because his schedule was changed again that day, October 13. Serafis asked him whether Captan gave him a new schedule. Garcia said that he had (referring to the schedule given to him on Monday, October 11).

The new schedule required Garcia to work 5 days per week, Tuesday through Thursday, and Saturday and Sunday. The new schedule consisted of a 52-hour work week. However, Garcia did not work that week.

Garcia testified that in their conversation on October 13, Serafis asked him "why do you insist in staying here." Garcia answered that he was working. Serafis asked if he was happy and Garcia replied that he was. Serafis responded that he did "not believe that you are happy." Garcia asked why. Serafis responded "because what we did, the lawsuit." Garcia answered that "I had to do that someday."

Serafis replied that "if you are not happy why [do you] insist to be there?" Garcia asked "if you want me to leave I will leave." Serafis said "this way, I don't want to see all of you here." Garcia told him "if you don't want to see us why don't you fire us?" Serafis replied "I cannot fire you. You can leave by yourself." Garcia responded that if Serafis wanted him to leave he would do so. Serafis asked when he could leave and Garcia said "right now." Serafis responded "you cannot leave now. You have to [have] somebody to replace you."

Serafis phoned the counterman, who was off that day, and asked him to come to work to replace Garcia. The counterman

arrived at about 10 am and Garcia accompanied Captan to meet with Serafis and his wife, Angela.

At the meeting, Serafis gave Garcia an envelope containing his pay, declaring that "I don't want to see you around my business." Garcia noted that Serafis made that comment in their first conversation that day. Nevertheless, as noted above, Garcia quoted him as saying essentially the same thing—"I don't want to see all of you here." Garcia left the restaurant after his second conversation with Serafis.

Garcia stated that on his way out of the restaurant Captan told him that "what happened here was not right. It's against the law." Captan advised him to advise his attorneys of what had occurred.

Garcia testified that he was discharged by Serafis telling him that he did not want to see him or the other workers anymore. Garcia denied quitting or stopping work voluntarily.

Captan testified, denying that he asked Garcia to withdraw the suit and further denying that he offered him more hours of work if he did so. Captan further stated that, although Garcia was an "excellent" employee, he observed that he was "dragging a little bit" following the filing of the lawsuit. Captan believed that the FLSA case was "bothering him." Accordingly, Captan told Garcia that he could speak to his attorneys "if you want we are willing we can do a settlement."

Captan testified that he believed that if Garcia received an offer from his attorneys to settle the matter the case would be "finished earlier" and he would resume his excellent work. Although Garcia told Captan that he would advise him as to whether he wanted to settle the matter, he did not. Captan denied offering Garcia $6000 if he withdrew the lawsuit, adding that he did not mention a sum of money to settle the case.

Captan denied reducing Garcia's hours because the lawsuit was filed. Captan admitted that after he gave Garcia the new 40-hour weekly schedule Garcia told him that he was not happy with 40 hours' work and was quitting because his hours were reduced to 40 per week. Captan denied telling him that what had occurred was not right.

Serafis testified, denying asking Garcia why he insisted on staying at the restaurant and also denied asking if he was happy there. Nor, according to Serafis, did he ask Garcia why he did not leave. Nor did he tell Garcia that he did not want to see him at the restaurant in the future. Serafis further denied that Garcia asked him why he did not fire him. Serafis denied making Garcia an offer to settle the FLSA lawsuit.

However, Serafis conceded that Garcia quit because his hours were reduced to 40 per week.

2. Miguel Romero Lara

Lara worked for the Respondent for 25 years as a deliveryman.

Lara testified that in 2014 he asked Serafis to reduce his hours of work to 48 hours per week because he intended to visit Mexico and needed time off to attend his children's' college graduation there. He stated that he did not make that trip. In this respect I credit Lara's testimony over that of the Respondent's witnesses who stated that Lara's request for reduced hours was in 2015.

Lara stated that his hours of work were reduced from 48 to 40 at that time.

Before the lawsuit was filed in August, 2015, Lara worked a regular schedule of 6 to 7 hours per day for 6 days per week. He worked about 40 hours per week and earned wages of $210 per week. His tips ranged from $60 to $70 per day on weekdays and $90 to $100 per day on weekends, or total weekly tip earnings of $430 to $480. Lara's total wages and tips per week, prior to the lawsuit, were $640 to $690.

Captan testified with the aid of the Red Book that Lara's regular schedule during the first half of 2015 consisted of 6 days of work per week or 72 hours per week. Lara requested and received a reduction in his hours and he then worked 48 hours per week. Captan further testified that thereafter, in the week ending September 7, Lara worked 30 hours.

Captan's son began work at the Respondent in July, 2015, 1 month before the lawsuit was filed. Lara stated that in late August, 2015, following the filing of the FLSA suit, Captan told him that Serafis directed that Lara's schedule be changed because employees' hours of work would be reduced. Lara's schedule was changed so that he worked only 32 hours per week.

Lara worked that new schedule for about 2 weeks when, in late September, Captan gave him another schedule in which, instead of his having 1 day off per week, he was off for 3 days, Monday, Thursday and Friday. He worked on Tuesday, Wednesday, Saturday and Sunday. Pursuant to that schedule he was assigned to work only 20 hours per week whereas in the late August schedule he worked 32 hours, and prior to the lawsuit he worked 40 hours per week.

Pursuant to the newest schedule, Lara received wages of $125 per week and tips of about $360 to $380 per week because of the reduced workweek. That sum should be compared to tips he received in the amount of $430 to $480 per week prior to the filing of the lawsuit.[2] He also believed that his tips declined because the dishwashers, who occasionally made deliveries before the lawsuit, were assigned to make more deliveries following the filing of the suit. In addition, Captan's son made deliveries during that time.

According to the late September schedule, Lara was assigned to work Tuesday, Wednesday, Saturday and Sunday. Lara worked that new schedule for about 1 week.

Lara stated that he was told by Serafis that he should not come to work on Sunday, October 11 which was his regular work day. He asked Serafis whether, since he would be off on Sunday he could come to work on Monday which was his scheduled day off. Serafis told him not to come to work on Monday.

Lara came to work on Tuesday, October 13. At that time he was not scheduled to work on Monday, Thursday and Friday. He had just been given the prior Sunday off. Accordingly, Lara asked Serafis whether he would be assigned to work only 2 days per week, Tuesday and Wednesday. Serafis said that he could only work Tuesday and Wednesday.

[2] The amount of tips Lara received pursuant to the schedule change in late August was not offered in evidence.

Lara worked that day, Tuesday and the following day, Wednesday, October 14. That day he again asked Captan if his workweek consisted of only 2 days. Captan said it had, and that Serafis hired someone else to work on Saturdays and Sundays.

Lara stated that the following day, October 15, Captan told him that Serafis had said that Lara could only work 2 days per week for 4 hours each day. Lara replied that he could not work 2 days for four hours each day. Captan paid him $60 for the 2 days and told him that the workers should proceed with their lawsuit. Lara's tips that week were between $125 and $140.

Lara testified that he quit his job because he could not support himself with two 4-hour workdays per week.

Captan testified that in 2014 and 2015, before and after the FLSA lawsuit was filed, Lara requested a reduction in his hours. After the suit, Captan reduced his hours to 48. He told Captan that he intended to move to Mexico shortly.

Lara's salary remained the same even though he worked fewer hours for the same number of days. Captan explained that Serafis decided to keep his salary at his regular rate.

Captan noticed at that time that Lara was "less cooperative" than he had been, refusing to bring supplies to other workers when asked, and that he only did deliveries. In the summer of 2015, Captan sought to "help him a bit" by hiring his (Captan's) son to make deliveries 10 to 15 hours per week. He added that he believed that Lara would be leaving soon and he wanted to teach his son the job so that he would not "get stuck."

Captan admitted that when he reduced Lara's hours by 15, he assigned those 15 hours to his son. Captan stated that when he reduced Lara's hours further "he just quit."

Captan stated that the dishwashers made deliveries before and after the lawsuit was filed. He noted that Lara was "slowing up" in making deliveries and he had to use the dishwashers to make sure that orders were delivered on time. Lara stated that Captan never told him that he was not satisfied with his performance.

Captan denied telling Lara on his last day of work that he should proceed with his lawsuit. Captan stated that Lara just said that he was leaving.

Serafis denied asking Lara to leave his employment, noting that Lara quit work because the Respondent reduced his hours. Serafis corroborated Captan's testimony that Lara asked that his hours of work be reduced because he planned to leave for Mexico shortly.

The General Counsel alleges that Lara was constructively discharged.

3. Jesus Delgado

Delgado worked for the Respondent for nearly 10 years. He worked 5 days a week as a waiter and 1 day a week as a counterman. Prior to the filing of the FLSA lawsuit, he worked 72 to 75 hours per week. He was paid $200 per week in wages and received weekly tips of $730 to $1010. Accordingly, his total weekly income was $930 to $1210 per week.

The Red Book record of hours and days worked shows that in the weeks ending September 7 and 14, Delgado worked 53 hours. In the week ending September 21, he worked 51 hours and in the following week he worked 61 hours. In the week ending October 5 he worked 52 hours and in the week ending October 19, Delgado worked 46 hours.

Delgado stated that in early September, Captan told him that his hourly schedule would be changing. His hours were reduced to 55 to 62 per week and his pay rate was changed to $5 per hour. His weekly pay was from $286 to $300. He complained to Captan and Serafis that he was not working 72 hours per week as he had previously.

Delgado testified that he recorded a conversation with Captan on September 28. Captan told him that regardless of what his attorneys told him, Captan's attorneys said that the FLSA case would take 1½ to 2½ years to be resolved. Captan asked if his lawyers gave him some "numbers."[3]

Delgado told Captan that his attorneys calculated that he was owed $5 per hour for 12 hours per day for 6 days per week times 6 years plus overtime pay.

Captan told Delgado that the Respondent's attorneys also calculated what his pay should be. Captan told him that, assuming that $60,000 was awarded, one-third would go to the attorneys, one-third to the government for taxes, and $20,000 for himself.

Captan advised him that the Respondent would deduct taxes from the amount he received. Captan calculated the amount of taxes owed at $2000 times six years, leaving Delgado with $6000 or $9000. He further advised Delgado that the Respondent would pay the amount owed him over a period of three years.

Captan told Delgado that he spoke to Gonzaga and another employee about his plan but did not receive an answer. Captan added that Serifas had another "plan" to "find good people" and that he would have everyone work 40 hours, and be paid the "correct pay." Captan said that he believed that Delgado was a "smart man" and that he was "a friend."

Captan advised Delgado that the Respondent's lawyers would wage a "strong fight" but that they did not want the case to continue for 5 years, but that "if the number comes to 60, you ended up with something like this." He told Delgado that "It's going to be a lot of cuts."

Captan asked for an answer from Delgado after which he would "start working" for Garcia and Gonzaga. He offered a payout over 3 years and "no taxes and nothing." Delgado asked for time to speak with the other workers "to get the right number." Captan said that Delgado would "end up with 11 or 12 and get payments . . . right away, cash . . . ."

Captan added that "60 or 65 hours . . . it's never going to happen again, everybody is going to be 5 days in the near future."

Delgado stated that, thereafter, 1 or 2 weeks before his last day at work, he was told by Serafis that his schedule would be changed to include 3 days as a counterman and 1 day as a waiter for which he would receive $5.25 per hour and that taxes would be deducted from his pay.

[3] The Respondent's attorney stated that he compared the recordings of the September 28 and October 18 conversations to the written transcripts and confirmed the accuracy of the transcripts as compared to the recordings.

Two or three days later, on October 18, Serafis gave him a new schedule in which he was scheduled to work as a counterman for 40 hours per week and receive $210 per week in wages. He recorded that conversation.

Serafis asked Delgado . . . "you insist on staying here?" Delgado said he did and Serafis asked "why you want to stay with this, with this hours?" adding "if you want to go, go, you don't have to stay . . . cause there's no money for you." Delgado replied that he would work as scheduled.

Delgado announced to Serafis that he was quitting that day. He told Serafis that he told Captan that morning that that day was his last. Serafis paid him for 2 days' work. Delgado thanked him and Serafis said "I hope you don't bother this store because if you bother this store, I am going to bother you." Delgado said that he would not.

Delgado testified that he quit his employment because his weekly hours were reduced from 72 or 75 to less than 40, and that he received fewer tips as a counterman.

Delgado stated that the Respondent did not offer to increase his hours above 40 as a counterman.

Captan conceded that he reduced Delgado's hours from 70 to 50 or 55. He stated that following the filing of the suit and the reduction in his hours, he noticed a change in Delgado's work performance. He had been the best waiter in the restaurant but following the lawsuit he found that he was "dreaming a little" and not working as fast as before.

Captan stated that following the reduction in his hours he "tried to do a settlement with him" if he needed money quickly and in order to cause a change in his performance.

Captan admitted that he suggested that a fair settlement would be $60,000, and conceded telling Delgado that he could speak with Serafis to "maybe get you" that sum. He advised Delgado that the lawsuit would be time consuming and that, in the end, he would receive only 30 percent of the amount claimed and even that sum would be made in payments. Captan asked him to consider speaking to his attorneys or a "neutral attorney" and advise Captan so that they could "settle up the case faster."

Captan stated that Delgado told him that if his hours were reduced to 40 he would quit. When Captan told Serafis of that conversation Serafis advised Captan that "we're going to do 40 hours for everyone no matter what."

Captan testified that on October 18, when Delgado's hours were reduced to 40 per week he told Captan that he was quitting. Captan stated that he was disappointed because Delgado was an excellent worker. Captan stated that later that day Serafis told him that upon telling Delgado that he would be working 40 hours he quit.

Captan denied suggesting to Delgado that he should withdraw the suit without speaking to his attorneys. He denied offering to increase his work hours if he withdrew the suit. Nor did he tell him that if he did not withdraw the suit he would be discharged.

Serafis denied asking Delgado why he insisted on working at the restaurant and further denied telling him that if he wanted to leave he should leave. Serafis conceded that Captan told him that Delgado would quit if his hours were reduced to 40, and Serafis advised Captan that if he wanted to leave that was his choice.

Serafis stated that after Delgado's hours were reduced to 40 he admitted, as set forth in the recording of the meeting, that he asked why Delgado insisted on working at the restaurant, and told him to leave if he wanted to. Serafis explained that he made that comment because Delgado had been "nagging" him each day for more hours of work, and he told him that if he was not happy and wanted to leave that was his choice.

Serafis further explained his comment in which he warned Delgado not to bother his business or he would bother him. Serafis stated that the meaning of his statement was that if Delgado left he should not return and bother the employees or "bad mouth" him, the restaurant or the employees, nor should he bother him each day about his hours of work.

Serafis explained that he could not assign Delgado to more hours than 40 because he was attempting to cut the hours of all employees to 40 per week.

4. Miguel Botello Gonzaga

Gonzaga was employed by the Respondent for about 15 years. He worked as a busboy.

Before the FLSA lawsuit was filed he worked 11 hours each day for a total of 66 hours for a 6-day week. His pay from the Respondent was $150 per week. His weekly tips totaled $40 to $60. His total weekly income was $590 to $610.

In late August, following the filing of the lawsuit, Captan gave Gonzaga a new schedule in which he worked only 4 days per week for 11 hours per day or 44 hours per week. He was paid wages of $130 per week and received tips of 315 to $335 per week. His total pay was $445 to $465 per week.

In early September, Gonzaga's schedule was changed again. Instead of working 11 hours per day, he was assigned to work 8 hours in each of his 4 days of work. Accordingly, he was scheduled to work 32 hours per week.

Gonzaga did not work that schedule. When he was given that change in hours he told Captan that he would not work that schedule because 2 days were already taken from his schedule and now his hours were cut further. Captan replied that he would ask Serafis to reinstate his 66 hour, 6-day week.

Gonzaga stated that he quit work that day because he could not afford to work the schedule he had been given. He stated that he could not support his family on two fewer days' work per week.

About 1 month after Gonzaga quit, Captan phoned him and asked him to return to work. Captan told him that he had to "take off the lawsuit." Gonzaga replied that he would withdraw the suit if the other plaintiffs did so. Gonzaga did not withdraw the lawsuit. Captan told him to return to work in 2 weeks.

Gonzaga returned to work on Monday, October 12. He was scheduled to work a 6-day, 54-hour week. He earned wages of $180 per week and received weekly tips of $365 to $400 or a total of $545 to $580 per week.

Gonzaga worked that schedule until Saturday, October 31. Gonzaga testified that at the end of that workday, Captan told him that Serafis decided that his new day off would be on Sunday. Gonzaga had always worked on Sunday. He earned the greatest amount of tips on Saturday and Sunday—$90 to $100

each day compared to $60 to $70 on weekdays when he worked 11-hour days, and compared to $45 to $50 per weekday when he worked 8-hour days.

Captan also told Gonzaga that day that perhaps his hours would be changed also, depending on what Serafis decided. He said that he would speak with Serafis "to know what he said he's going to be doing with me—what was going to happen to me…. not to do the same as he did to the others."

Captan told Gonzaga to report to work on Monday, November 2. When Gonzaga reported to work that day he observed that Serafis' nephew was working in his position as a busboy.

Gonzaga spoke to Serafis in private that day. Gonzaga testified that Serafis told him that he "was in another lawsuit" and showed him the charge that had been filed with the Board on October 22. Serafis pointed to Gonzaga's name in the charge and asked him why he was "in another lawsuit." Gonzaga replied that Serafis was not paying the correct amount of pay. Gonzaga stated that Serafis told him that if he wanted money, he would give it to him "under the table." Gonzaga replied that he did not file the charge in order to damage Serafis, but to obtain "justice."

Gonzaga testified that Serafis told him that "if you want to keep your job drop the lawsuit and I will keep my job." Gonzaga did not respond and left the restaurant. Outside the entrance he encountered Captan who told him that Serafis' actions in taking "two busy days and hours from [you] was not right and advised him to speak to his attorneys.

Gonzaga later testified on cross examination that Serafis told him that if he did not withdraw the lawsuit he would be fired but inconsistently stated on further cross examination that Serafis did not say what would happen if he did not withdraw the suit. I credit Gonzaga's first testimony that Serafis told him that if he did not withdraw the lawsuit he would be fired. That testimony is supported by Captan's quote of Serafis that Serafis told Gonzaga, referring to the newly filed charge, "hey Miguel, what is this? You working here and you suing the place?" or he told him "what is this? Why are you here working."

Gonzaga stated that when he left the restaurant that day it was his understanding that he had been discharged.

Gonzaga testified that he quit because Serafis removed 2 days from his workweek and, in addition, did not permit him to work on Sunday, his busiest day. He stated that another reason for quitting was because Serafis demanded that he withdraw the lawsuits as a condition of keeping his job and he did not withdraw the suits.

Captan testified that following the reduction in his hours, Gonzaga told him that he was quitting because he did not make enough money. At that time he was working about 45 to 48 hours per week.

Captan further stated that he recalled Gonzaga to work because he could not find a replacement and also because he was the best busboy he ever had—an honest and excellent worker.

Captan stated that when he asked Gonzaga to return to work, he promised that he would assign him 55 to 60 hours per week and indeed, he was given 58 hours per week. However, when Gonzaga returned to work Captan told him that he could not keep that promise because business was not that good and because Serafis ordered that everyone must be reduced to 40 hours with "no exception." Gonzaga then told him that he had to quit and left the premises.

Captan then told Serafis that Gonzaga had quit. Captan testified that Serafis told him that he told Gonzaga that morning that he received another lawsuit, referring to the charge, and asked him "hey Miguel, what is this? You working here and you suing the place?" or he told him "what is this? Why are you here working."

Serafis testified that he approved Captan's request to recall Gonzaga to work after he quit. Serafis conceded that Gonzaga quit the first time because his hours were reduced and that he wanted to work more hours. However, he denied that Captan told him that in order to persuade Gonzaga to return, he would have to offer him more hours. Serafis stated that he did not know that the Respondent would have to offer him more than 40 hours as an incentive for him to return to work. Serafis admitted that he was glad that Gonzaga returned to work because he was a "good man."

Serafis admitted showing Gonzaga the charge he received from the Board. He conceded telling Gonzaga that the charge stated that he discharged Gonzaga. He asked him what the charge was about—it says "that I fired you. I never fired you." Gonzaga left his office. Serafis denied speaking to Gonzaga about his hours at that meeting. Serafis denied telling him that he was promised more hours but that he could only work 40 hours.

Serafis further denied telling Gonzaga that if he withdrew the lawsuit he would pay him "under the table." Nor did he offer him any sum of money to withdraw the suit.

E. Credibility Determinations

I have taken into consideration Captan's testimony denying that he asked any of the four employees to leave his employ because of the FLSA lawsuit. He further denied reducing the hours of the four employees because of the suit. He maintained that their hours were reduced in order to save money by not paying overtime rates. Captan denied telling any of the four employees to withdraw the lawsuit or they would be discharged. Nor did he tell them that the Respondent's actions were not fair and that they should consult their attorney.

Where such testimony differs from that given by the four witnesses for the General Counsel, I credit their testimony. Their testimony was consistent with the recordings made by them of their conversations with Captan and Serafis. Their descriptions of their wages and hours were corroborated by the Respondent's payroll records and, to a large extent, by Captan's testimony.

The four employees' testimony was consistent with each other and was corroborated by the recordings of the conversations concerning the offers made by the Respondent to settle the FLSA case they brought. Their testimony was also consistent with their similar treatment by the Respondent's reduction of their hours and pay. I credit their testimony when it differs from that given by Captan and Serafis.

On the other hand, much of the testimony given by Captan and Serafis was elicited through leading questions. The Respondent's broad argument that it intended to reduce all its employees' hours to 40 is thoroughly contradicted by the fail-

ure of such an effort, even 1-1/2 years later, to do so. Further, Captan gave testimony concerning employees' work schedules which differed from the Red Book's recordings on that subject.

F. The General Counsel's Prima Facie Case

In cases such as this one involving alleged discrimination against employees because they filed a lawsuit, the Board examines the facts pursuant to its decision in *Wright Line*, 251 NLRB 1083 (1980).

In such cases, the General Counsel has the initial burden to prove that an employee's Section 7 activity was a motivating factor in the employer's action against him. The elements commonly required to support the General Counsel's initial showing are protected concerted activity by the employee, employer knowledge of that activity, and animus on the part of the employer. See, e.g., *Libertyville Toyota*, 360 NLRB 1298, 1301 (2014), enfd. 801 F.3d 767 (7th Cir. 2015). If the General Counsel makes the required initial showing, the burden shifts to the employer to prove by a preponderance of the evidence that it would have taken the same action even in the absence of the protected concerted activity. The employer does not meet its burden merely by establishing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action in the absence of the protected conduct. See, e.g., *Bruce Packing Co*., 357 NLRB 1084, 1086–1087 (2011), enfd. in pertinent part 795 F.3d 18 (D.C. Cir. 2015). If the evidence establishes that the proffered reasons for the employer's action are pretextual—i.e., either false or not actually relied upon—the employer fails by definition to show that it would have taken the same action for those reasons, regardless of the protected conduct. See *Golden State Foods Corp*., 340 NLRB 382, 385 (2003), citing *Limestone Apparel Corp*., 255 NLRB 722 (1981). *David Saxe Productions, LLC*, 364 NLRB No. 100 (2016). See also *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1184–1185 (2011); *Regal Recycling, Inc.*, 329 NLRB 355, 356 (1999). Animus may be inferred from the record as a whole, including timing and disparate treatment. *Brink's, Inc.*, 360 NLRB 1206, 1206 fn. 3 (2014).

The Respondent admits, at it must, the first two bases of the General Counsel's burden. Its brief (page 4), states that "the Employer does not dispute the General Counsel's contention that the employees were engaged in a protected activity by filing or joining an FLSA lawsuit for alleged unpaid minimum wages and overtime hours. Employer also does not dispute General Counsel's contention that the employer was aware of the protected activity, namely that the employees had filed an FLSA action."

Of course, Board law supports the Respondent's admission that the filing of the FLSA lawsuit constituted protected, concerted activity. *Beyoglu,* 362 NLRB No. 152 (2015).

The Respondent also partly admits the complaint allegation that it reduced the hours and pay of the employees. In this regard, as discussed below, the Respondent admits that it reduced the hours of the four employees because of its new policy of employing all its workers for 40 hours per week, thereby avoiding the payment of overtime rates of pay to its employees as required by the FLSA.

The question to be decided is the Respondent's motivation in reducing the hours and, as a result, the pay of the four employees. General Counsel argues that it was motivated in taking those actions by the filing of the FLSA lawsuit. The Respondent argues that it reduced the hours of the four employees and indeed, all its employees, as a result of its legitimate business decision to avoid the payment of overtime rates.

G. The Reduction of the Hours and Pay of the Four Employees and its Animus Toward Them

As set forth above, the Respondent does not dispute that it reduced the hours of the four employees involved herein. However, inasmuch as the complaint alleges that Garcia, Lara, Delgado and Gonzaga were constructively discharged because of the reduction of their hours and/or pay, I will discuss those reductions.

1. Justino Garcia

Prior to the FLSA lawsuit, Garcia worked 72 hours per week, earning wages and tips of $1,080 to 1,130 per week. In late August, his schedule was changed whereby he worked 50 hours per week, pursuant to which he earned $1,000 to $1,060 weekly. In a final change in schedule, which Garcia did not work, he would have worked 33 hours per week, and would have received $720 to $760 per week in wages and tips.

I credit the testimony of Garcia that he was told by Captan as set forth above, that the four employees did not know what they were doing and that Captan urged him to withdraw the lawsuit. I further credit Garcia's testimony, as conceded by Captan, that he discouraged Garcia to pursue the suit because it was time consuming and he would not receive the amount of money he expected. Further, I credit Garcia's testimony, as again corroborated by Captan, that the Respondent was willing to settle the suit.

I cannot credit Captan's denial that he mentioned the sum of $6,000. Garcia's testimony was precise and detailed. He quoted Captan as saying that if he accepted that sum, it would "save a headache" and he could continue working "as if nothing happened."

Garcia's recitation is believable. The evidence is clear, as testified by Delgado, that Captan also asked him for an "answer" regarding his offer of settlement. Further, Delgado credibly testified that Captan told him that Gonzaga and another employee did not give him an answer regarding his offer to settle the case.

Evidence of animus is Garcia's credible testimony that Serafis asked him why he insists on remaining at work, and that he did not want to see the employees at the restaurant. When Garcia challenged him, inquiring why Serafis did not fire them, Serafis said that he could not fire the men—they could leave voluntarily. Garcia said that if Serafis wanted him to leave he would do so and Serafis told him to leave immediately.

Serafis conceded that Garcia quit because his hours were reduced to 40 per week. I find, as alleged in the complaint, that Garcia was discharged. Serafis said that he did not want to see the men in the restaurant and demanded that Garcia leave the employ of the restaurant immediately. That constitutes the Respondent's discharge of Garcia.

I accordingly find and concluded that the General Counsel has made a prime facie showing that the Respond net was motivated in discharging Garcia, an employee of nearly 30 years, because of his protected activity in filing the FLSA lawsuit.

2. Miguel Romero Lara

Prior to the filing of the FLSA lawsuit, Lara worked 40 hours per week, earning a total of $640 to 690 per week. After the lawsuit was filed he was assigned to work 32 hours per week, and then, a schedule of 20 hours per week. Finally, he was scheduled to work only 8 hours per week. Had he worked that schedule, he would have received a weekly income of $185 to $200 in wages and tips.

The evidence thus establishes that during his final 2 months of employment, from the time the lawsuit was filed in mid-August to mid-October, 2015, Lara suffered a reduction in his weekly hours from 40 to 8, and in his weekly salary, from an average of $665 to $192.50.

Thus, Lara's weekly income was reduced by 71 percent. When he was informed that he was scheduled to work only 2 days per week for 4 hours per day he told Captan that he could not do so. He testified that he quit his job because he could not support himself with two 4-hour workdays per week.

The General Counsel alleges that Lara was constructively discharged.

Normally, if an employee voluntarily quits, he cannot claim that he has been discriminatory discharged.

However, the Board has recognized that an employee may be constructively discharged.

A constructive discharge occurs when an employee quits because his or her employer has deliberately made working conditions unbearable and it is proven that (1) the burden imposed on the employee caused, and was intended to cause, a change in the employee's working conditions so difficult or unpleasant that the employee is forced to resign and (2) the burden was imposed because of the employee's union or concerted activities. *Yellow Ambulance Service*, 342 NLRB 804, 807 (2004); *Intercon I (Zercom)*, 333 NLRB 223, 223 fn. 3 (2001). The Board has explained that regarding the first part of the legal standard, "the test for intent is not limited to whether the employer specifically intended to cause the employee to quit, but includes whether, under the circumstances, the employer reasonably should have foreseen that its actions would have that result." *Yellow Ambulance Service*, above, at 807.

The Board has found that employees who were coerced into leaving work by an adverse change in working conditions motivated by an employer's animus toward their concerted activities did not voluntarily quit but were coerced into resigning their jobs, thereby being constructively discharged. *Kosher Plaza Supermarket*, 313 NLRB 74, 87 (1993); *Kenrich Petrochemical*, 294 NLRB 519, 539 (1989); *Michael Adkins*, 323 NLRB 311, 322 (1997).

The Board has found that the reduction of work assignments and consequently the income of its employees was done with the "awareness and expectation what it would force the termination of employees who engaged in protected activity and that it was "sufficient to constitute such onerous conditions as to effectuate a constructive discharge." *Alterman Transport Lines, Inc.,* 308 NLRB 1282, 1293–1294 (1992).

With equal effect the Board has found that large reductions in employees' incomes are sufficient to compel a reasonable employee to quit his job. *Consec Security,* 325 NLRB 453, 453 (1998). In that case the Board held that "a significant reduction in income for an indefinite period of time, causing an employee to quit and seek alternative employment, when a motive for such treatment was protected activity will establish constructive discharge," citing *T & W Fashions*, 291 NLRB 137, 142 (1988); *La Favorita, Inc.*, 306 NLRB 203, 205 (1992); *Trumbull Industries*, 314 NLRB 360, 365 (1994). The Board further noted in *Consec* that "the reduction of the employee's wages by nearly 25 percent clearly meets this test. Thus, it can reasonably be inferred that such a large reduction in income would impair an employee's ability to meet living expenses to such an extent that the employee would be compelled to seek alternative employment."

In *Kime Plus, Inc*., 295 NLRB 127, 146 (1989), and *Holiday Inn of Santa Maria*, 259 NLRB 649, 662 (1981), the Board found a constructive discharge where the reductions in pay suffered by the employees there were less, and in some cases far less, than Lara endured here.

In *Crow Inc.,* 206 NLRB 439, 443 (1973), the employer reduced the employee's work schedule from 5 days per week to 4, notwithstanding his complaint that he could not make enough money on that basis and then quit to accept a full-time job affording him "a livable wage." The Board found that the "reduction of the employee's hours of work, and consequently his weekly pay, was clearly the cause of his leaving respondent's employment" and constituted his constructive discharge.

In *Sav-Mor Centers, Inc*., 234 NLRB 775, 781 (1978), the Board found a constructive discharge in the reduction of an employee's hours from about 15 per week to 9. The employee concluded that she could not support herself on $27 per week and quit her job. The Board stated that "the fact that the discrimination placed one employee in a position where she could not subsist merely carries the illegal action one step further and constitutes a constructive discharge."

In *Ybarra Construction Co.,* 343 NLRB 35, 41 (2004), following the employee's filing of a wage claim his hours were reduced and his wage rate decreased from $17 per hour to $11.35. He was also demoted in position and restricted to a certain type of duties. The Board found that he was constructively discharged.

Here, the General Counsel has established that in a short period of time Lara, who had been employed for 25 years, endured a drastic reduction in his hours and earnings. The evidence is clear that his quitting his job fits within the definition of a constructive discharge.

Thus, I find that Lara quit because the Respondent deliberately made working conditions unbearable by the cutback in his hours and earnings. That burden caused, and was intended to cause, a change in his working conditions from a schedule of 40 hours a week prior to the filing of the lawsuit to 8 hours per week. That change was so drastic as to force Lara to resign, which he did, for that precise reason—he could no longer support himself with the 8 hours he was assigned. It is also clear

that such a burden was imposed on Lara because of his concerted activity of filing the lawsuit. *Yellow Ambulance Service*, above.

As noted in the above cases, the employee's belief that he could not meet his living expenses with the reduced hours of work and pay he received, is a factor in finding a constructive discharge.

Accordingly, I find that Lara quit his employment because the Respondent deliberately made his working conditions unbearable by reducing his hours and pay, and those changes in his employment caused him to resign. I further find that such a cutback in his conditions of employment was imposed because of his activities in filing the FLSA lawsuit.

I therefore find that the General Counsel has made a prima facie showing that Lara, a 25-year employee, was forced by the Respondent to quit his employment, thereby causing his constructive discharge, because he filed the FLSA lawsuit. *Wright Line*, above.

3. Jesus Delgado

Prior to the filing of the FLSA lawsuit, Delgado worked 72 to 75 hours per week, earning wages and tips of $930 to $1,210 per week. Following the filing of the lawsuit, Delgado reduced his hours to about 52 per week and then to 40. The cutbacks in hours suffered by Delgado caused a great reduction in his income.

The Respondent's animus toward Delgado is amply shown in his recorded conversation with Serafis shortly before he quit. Thus, following his reductions in hours, Serafis expressed his disbelief that Delgado wanted to continue to work there. Serafis asked him "you insist on staying here?" Delgado said he did and Serafis asked "why you want to stay with this, with this hours?" adding "if you want to go, go, you don't have to stay . . . cause there's no money for you." Delgado replied that he would work as scheduled.

That comment establishes that the Respondent's object in reducing Delgado's hours and pay was to have Delgado quit. Serafis expressed his incredulity that Delgado would want to work with the diminished hours he was assigned when, at the same time "there's no money for you."

Accordingly, for the reasons set forth above regarding Lara, I find that the General Counsel has made a prima facie showing that Delgado, an employee for nearly 10 years, was forced by the Respondent to quit his employment, thereby causing his constructive discharge, because he filed the FLSA lawsuit. *Wright Line*, above.

4. Miguel Botello Gonzaga

Prior to the filing of the FLSA lawsuit, Gonzaga worked 66 hours per week earning $590 to $610 per week as wages and tips. After the lawsuit was filed, 2 weeks later, his hours were reduced to 44 per week resulting in a large decrease in his earnings. A couple of weeks after that the Respondent gave him a schedule whereby he would work 32 hours per week which was half his original hours. In addition, his earnings, if he had worked that schedule would have been diminished accordingly.

Gonzaga refused to work that new schedule and quit. For the reasons set forth above, I find that Gonzaga, an employee for more than 15 years, quit his employment because the Respondent deliberately made his working conditions unbearable by reducing his hours and pay, and that such changes in his employment caused him to resign. I further find that such a cutback in his conditions of employment was imposed because of his activities in filing the FLSA lawsuit.

Accordingly, for the reasons set forth above regarding Lara, I find that the General Counsel has made a prima facie showing that Gonzaga was forced by the Respondent to quit his employment, thereby causing his constructive discharge, because he filed the FLSA lawsuit. *Wright Line*, above.

As set forth above, 1 month after Gonzaga quit, Captan recalled him to work but said that he had to withdraw the lawsuit. After his return to work, Gonzaga was pointedly told by Serafis that he was "in another lawsuit" referring to the NLRB charge, and told him that if he wanted to retain his job he had to drop the lawsuit.

Gonzaga quit that day. He stated that one of the reasons he quit was Serafis' demand that he withdraw the lawsuits as a condition of keeping his job and he did not drop the lawsuit. He also stated that when he left the restaurant that day it was his understanding that he had been discharged.

It is clear that Gonzaga did not intend to quit at that time. He had been recalled to work and was working 54 hours per—more than the 44 hours and 32 hours he had received in his prior schedules after the lawsuit was filed.

In addition, the Respondent at that time was agreeable to his continuing to work. However, when the charge was filed Serafis changed his attitude and told him "you working here and you suing the place . . . why are you here working?" Thus, Serafis was motivated to discharge Gonzaga because he filed the charge. Serafis confronted Gonzaga with the choice of withdrawing the charge or continuing to work.

The Board has recognized a "Hobson's Choice" theory of constructive discharge. Pursuant to that principle, an employee's voluntary quit will be considered a constructive discharge when an employer conditions an employee's continued employment on the employee's abandonment of his or her Section 7 rights and the employee quits rather than comply with the condition. *Titus Electric Contracting, Inc.*, 355 NLRB 1357, 1357 (2010); *Intercon I (Zercom)*, 333 NLRB 223, 223 & fn. 4 (2001). The Hobson's Choice at issue must be clear and unequivocal and the employee's predicament not one which is left to inference or guesswork. *Intercon I (Zercom)*, above, at 224 & fn. 9.

Here, it is clear that Gonzaga was presented with a Hobson's Choice. He could retain his job if he withdrew the lawsuits. This finding is supported by the testimony of Captan who quoted Serafis as showing Gonzaga the newly filed charge and asking him "hey Miguel, what is this? You working here and you suing the place?" or he told him "what is this? Why are you here working."

Thus Serafis expressed his disbelief that Gonzaga could legitimately work for the employer that he was suing. Serafis' statements may also be viewed as encouraging Gonzaga to quit, as if to say "how can you sue us and continue to work here?" It also expresses Serafis' animus toward Gonzaga for suing the Respondent.

The evidence supports a finding that the Respondent's conduct led Gonzaga to reasonably believe that he was compelled to choose between withdrawing the two lawsuits or being terminated.

Gonzaga was given that Hobson's Choice twice—first, when he returned to work upon the condition that he must withdraw the FLSA lawsuit and then, when the charge was filed, he was asked rhetorically "you working here and you suing the place?"

Thus the Respondent made the clear impression on Gonzaga that his continuing to work was inconsistent with his maintaining the two lawsuits. The Respondent presented him with the obvious choice—even if it was not expressly made—drop the lawsuits and you can continue to work. He had to abandon the lawsuits if he wanted to preserve his job. Faced with that choice, Gonzaga quit.

Thus, presented with the Hobson's choice of relinquishing his statutory rights or facing termination, Gonzaga resigned rather than abandon his coworkers and their lawsuit.

Although Serafis did not literally state that Gonzaga had to abandon his support for the Union as a condition of his continued employment, the Respondent's message was unmistakable. The Hobson's Choice was clearly and unequivocally conveyed to him. The Respondent's conduct led Gonzaga to reasonably believe that continuing to support his coworkers and continue his participation in the lawsuit and continuing his employment were incompatible. Thus, he was compelled either to abandon his statutory rights or to quit. *Intercon I (Zercom)*, 333 NLRB 223, 224 (2001).

I therefore find that the General Counsel has made a prima facie showing that Gonzaga was forced by the Respondent to quit his employment, thereby causing his constructive discharge, because he filed the FLSA lawsuit and because he refused to withdraw that lawsuit and the charge. *Wright Line*, above. I further find that the Respondent's retaliation against him was motivated by his filing the charge in violation of Section 8(a)(4) of the Act. I also find that Serafis' comment that Gonzaga was still working despite his filing the charge constituted a threat to discharge him in violation of Section 8(a)(1) of the Act.

H. The Respondent's Defense

Inasmuch as I have found that the General Counsel has made a prima facie showing that employees Garcia, Lara, Delgado, and Gonzaga were unlawfully discharged or constructively discharged because they filed the FLSA lawsuit, the burden shifts to the Respondent to prove by a preponderance of the evidence that it would have taken the same action even in the absence of their protected concerted activity. *Wright Line*, above.

The Respondent maintains that prior to the filing of the FLSA lawsuit on August 11, 2015, it was not aware of its legal obligation to pay employees at a time and one-half overtime rate for hours worked over 40 per week.

Following the filing of the lawsuit the Respondent instituted a new policy whereby it would reduce, "across the board," all its employees' work hours to 40 per week, including the hours of the four employees involved here. Its purpose in doing so was to avoid paying overtime rates.

The Respondent therefore maintains that it did not discriminate against the four employees by reducing only their hours, but had a policy of reducing all its employees' hours of work. The General Counsel disputes this, arguing that the hours of only the four alleged discriminatees were reduced in the 2-month period following the filing of the lawsuit.

I cannot find that the Respondent has shown that it would have reduced the hours of the four employees even in the absence of their protected concerted activity.

First, the evidence establishes that the Respondent did not and has not reduced all its employees' hours of work. Thus, Captan admitted that, at the time of the hearing, 11 months after the filing of the lawsuit, the Respondent had still not reduced all its employees' hours to 40. Indeed, he claimed that the Respondent hoped to accomplish that goal by the end of 2016, nearly 1-1/2 years after the filing of the lawsuit.

Captan further conceded that upon reducing employees' hours he found that 1 or 2 weeks later he "couldn't make it. We tried." Captan noted that "we were not ready to have everyone go to 40 hours tomorrow morning." That is understandable, but the fact that the Respondent does not expect to fulfill its policy for another 1-1/2 years leads one to question its commitment to its policy and therefore the validity of that policy.

Thus, it must be observed that the Respondent acted at breakneck speed in reducing the hours of Garcia, Lara, Delgado and Gonzaga while it takes an unhurried approach to the implementation of its policy toward its other employees.

Further, it appears that where it suited the Respondent's business interests it abandoned its policy of reducing workers' hours to 40 and even increased their hours above 40. Thus, after Gonzaga quit because he was not making enough money with the 32 hours per week he was assigned, he was rehired and scheduled to work 58 to 60 hours per week.

Apparently the Respondent was motivated to recall Gonzaga because he was the "best busboy" it ever had and an excellent worker according to Serafis and Captan. Accordingly, the Respondent deviated from its policy of having employees work only 40 hours per week when it suited its business purposes.

Regarding its other workers, Captan stated that the wait staff had all been reduced to 40 hours but the counterman is still working 45 to 50 hours, and that it was difficult to reduce the hours of the kitchen staff such as the chef and the chef's helper. He stated that some kitchen staff's hours were reduced from 55 or 60 hours per week to 50. But he does not expect to reduce their hours to 40 until the end of 2016.

As a further example, David Garcia, a kitchen worker, had his days of work reduced from 6 to 5, but then the following week the Respondent had to increase his days to 6 because the restaurant "couldn't make it without him, even one day."

Thus, as will be further demonstrated below, the Respondent has not shown that it had a consistent, enforced policy of reducing all its employees' hours to 40. Its immediate enforcement of its "policy" of reducing employees work hours to 40 was applied only to the four employees shortly after the FLSA lawsuit was filed.

Captan testified giving examples from the Red Book in an effort to prove that the Respondent reduced the hours of all of its employees, or was engaged in an ongoing program to do so.

In using the Red Book, Captan testified regarding the hours and days of work in 2015 of certain employees. In many instances Captan's testimony did not accord with the Red Book record. I must credit the written, daily record as made by Captan, over his testimony.

In addition, according to Captan, after the suit was filed, the Respondent decided to employ more employees who would work 40 hours per week rather than have fewer employees who would earn overtime. Captan's aim in hiring more workers was to reduce the hours each employee worked so that the Respondent would not have to pay overtime rates, thus saving money in payroll costs.

Another factor was that Captan believed that employees who worked overtime would be tired and would not perform as well as if they had 2 or 3 days off. No evidence was presented to support this claim. Indeed, the four employees worked for a cumulative total of 80 years during which they worked extensive overtime hours with no apparent complaints by them or the Respondent's supervisors. Indeed, Captan described them as "excellent" workers.

The case of Denise Santos is significant. Santos worked 4 days, 10 hours per day, in the week ending September 7, and worked 3 days, 10 hours per day in the week ending September 14. Thereafter, she continued to work 3 days per week. In the weeks ending September 28 and October 5, she worked 44 hours per week.

Significantly, Captan testified that the Red Book does not show a reduction in the hours of work for the week ending September 7 for any employee other than the four employees. He further significantly stated that for the week ending September 14, the record does not show that any employee other than the four employees and Santos experienced a reduction in their hours.

Ruben Sanchez, a kitchen employee, worked 6 days in the week ending September 7. In the week ending September 14, he worked 5 days and worked 5 days thereafter. This would tend to show that Sanchez' hours were reduced in mid-September, as were the four employees. However, a closer examination of the Red Book shows that from January to August, 2015, Sanchez worked a 5-day week for 23 weeks in that period, and also worked 6-day weeks during 11 weeks in that period.

Accordingly, although the evidence shows that Sanchez' work schedule was reduced from 6 to 5 days per week in mid-September, that reduction followed a significant period of time when he had also worked a 5-day workweek in the prior 6 months. Thus, it has not been shown that Sanchez' regular schedule had been 6 days prior to his hours being reduced to 5 days, as was the case with the four employees.

There was conflicting testimony concerning waiter Kumar Ashok. There was testimony that in the week of September 7, he worked 6 days and was reduced to 5 days in the week of September 14. However, Captan testified that he worked 5 days in the week of September 7. In addition, the evidence establishes that between January and August, 2015, he regularly worked 6-day weeks in 24 weeks. He also worked 8 weeks in which he logged 5 days per week, and two 7-day weeks. Between September and December, 2015, he worked a 6-day week in 12 of those weeks and a 5-day week in 4 of those weeks. Accordingly it has not been shown that Ashok worked a regular schedule as did the four employees and that such schedule had been reduced following the filing of the lawsuit.

Franky Javier worked 4 days in the week of September 7 and 1 day in the week of September 14. However, the Red Book shows that Javier's wages increased from $50 to $70 per week between January and July, 2015, and to $90 per week in August. From September to December 2015, Javier's weekly wages were more than $150. The records also show that from January to August, he regularly worked 24 hours per week, but starting in October, his regular hours of weekly work were more than 30. Javier's record thus shows that his hours of work and wages were increased following the filing of the FLSA lawsuit when the hours of work and wages of the four employees were reduced.

Shah Bhuiuyan worked 5 days or 6 days per week from January to December 2015. His hours were not reduced during the relevant time period.

Prior to the week ending September 7, David Garcia worked 6 days a week. In the week ending September 7, he was reduced to 5 days per week. Captan explained that when Garcia was reduced to 5 days, the Respondent "had to bring him back to six" the following week because he was a kitchen worker and at that time "they couldn't make it without him, even one day less." It should be noted that Garcia also worked less than 6 days per week before September, 2015.

Captan compared the record of Sonok Gulti to that of Garcia. Gulti worked 6 days per week in the vast majority of weeks from January to August, 2015. In those weeks in which he did not work 6 days he worked 5-day and 7-day weeks. Accordingly, Gulti's days of work were not reduced. Captan explained his increase in days per week because of a "problem in the kitchen."

Employee Emerson worked less than 6 days per week at least 12 times between January and August, 2015. In each week from September through December, 2015, however, he worked 6 days per week.

Prior to September 7, cashier Arlis Puga worked 10 hours per day for 4 days per week. In the week ending September 7, she worked 30 to 38 hours per week. In the weeks ending September 14 and 21 she worked 38 hours per week.

Captan testified that other than the four employees and Puga, no other employee's pay rate was changed from a daily pay rate to an hourly pay rate in the week ending September 7. He further stated that in the weeks ending September 7 and 14, he did not calculate pay based on the number of hours worked for any employees other than the four employees and Puga.

Kumar Tiki, a waiter, worked 62 hours per week but was reduced to 48 to 52 at the time of the hearing. It must be noted that Captan testified that it was "easy" to reduce the hours of waiters to the goal of 40 hours per week but Tiki is an example of a waiter whose hours were not reduced to 40 at the time of the hearing.

Kitchen worker Fernando Alanis worked 60 hours per week before the filing of the FLSA lawsuit and at the time of the hearing worked 55.

Garcia Fernando, the chef's helper, worked 40 hours per week but then worked more than that because, as Captan explained, he had problems replacing him.

Garcia Moreno David worked 41 hours per week but at the time of the hearing worked about 50 hours.

Prior to the filing of the lawsuit Cesar Bensantis worked 55 to 60 hours per week. In the week ending September 7, he worked 39 hours per week but at the time of the hearing worked 52 hours.

In the week ending September 21, Martin Reader worked 54 hours, employee Potsas worked 40 hours, and employee Costas worked 30 hours. It was not shown whether their hours were reduced.

Yolanda Smiarkowska and Virginia Volka, both of whom were hired in 2016, worked 40 hours. Since they were hired at least 4 months after the FLSA lawsuit, nothing has been proven by the fact that they were hired to work 40 hours per week.

Captan testified that Irene Katzadus' weekly hours were reduced from 55 to 40. Marcello Rosas, a cook, was reduced from 60 hours to 56 or 57. Fernando Alanis had his 60-hour week reduced to 54 or 55. Fernando Garcia's hours were cut from 60 to 52 or 53. Sonuk Coolgit, a busboy was reduced to 40 hours. The hours of Margarito Lucero, a waiter, were reduced to 40 hours. Margarita Hernandez Salvador worked 35 to 40 hours.

Jose Rosas worked 6 days per week in most weeks from January to August,2015. Captan testified that prior to the filing of the lawsuit, Rosas worked 64 hours in the week ending July 20. He worked 6 days per week in the weeks ending September 7, 14, and October 19. In the week ending October 26, he worked 7 days per week.

Freddy Garcia worked 6 days per week and some 5-day weeks between January and August, 2015. In September, 2015, he worked 6 days per week and continued to work such a schedule in most weeks until late 2015.

In response to Captan's questions of employees as to whether they were happy with the decrease in their hours, they stated that they were happy. The Respondent apparently argues that no violation can be found if the workers were pleased with the reductions in their hours.

I first find that the question was "loaded." The employees reasonably could fear retaliation if they responded that they were not happy. Second, it is clear that they were not content with their new schedules. They did protest that they needed more hours and would quit if their schedules were not returned to what they were before the lawsuit was filed.

Further, the workers refused to withdraw their lawsuit, thereby signaling that they were not happy with the reductions in their hours of work.

Captan denied asking any of the four employees to leave his employ because of the FLSA lawsuit. He further denied reducing the hours of the four employees because of the suit. He maintained that their hours were reduced in order to save money by not paying overtime rates. Captan denied telling any of the four employees to withdraw the lawsuit or they would be discharged. Nor did he tell them that the Respondent's actions were not fair and that they should consult their attorney.

Captan testified about the alleged poor work performance of Garcia, Lara, and Delgado. No credible evidence has been produced substantiating that testimony. Moreover there is no claim that they were discharged for malfeasance. Their long service with no evidence of warnings or discipline refutes any such testimony.

Conclusions Regarding the Respondent's Defense

I cannot find that the Respondent met its burden of proving that it would have reduced the hours of work of Garcia, Lara, Delgado and Gonzaga even in the absence of their concerted action of filing the FLSA lawsuit.

It has not proven that it instituted and consistently enforced a policy and plan of reducing its other employees' hours of work.

As demonstrated above, the Respondent's practice of reducing employees' hours of work was inconsistent. Thus, where the Respondent reduced kitchen employees' hours but then found that it could not do without their work "even for one day" it reversed its policy and restored the hours withdrawn. Further, after constructively discharging Gonzaga by lowering his hours, when the Respondent found that it needed Gonzaga's "excellent" service, he was rehired to work and assigned to work significantly more hours than 40.

As shown above, the hours of other employees were not reduced. Indeed, the Respondent admits that it does not expect to reduce all its employees' hours until the end of 2016.

The Board has long held that the failure to have a consistent application of a policy which is uniformly followed is evidence of an unlawful motive in applying it to employees who have engaged in protected, concerted activity. *George P. Baily & Sons, Inc*., 341 NLRB 751, 758 (2004); *Clock Electric, Inc*., 323 NLRB 1226, 1232 (1997); *Heartland Food Warehouse*, 256 NLRB 940, 943 (1981); *St. Paul's Church*, 275 NLRB 1242, 1257–1258 (1985).

I find that Garcia, Lara, Delgado and Gonzaga did not quit their employment. They were discharged and/or constructively discharged.

I accordingly find and conclude that the Respondent has not met its burden of proving that it would have discharged or constructively discharged Garcia, Lara, Delgado and Gonzaga even in the absence of their protected, concerted activities. *Wright Line*, above.

Further Analysis and Discussion

The complaint, as amended, alleges that the Respondent reduced the hours and/or pay of Garcia, Lara, Delgado and Gonzaga because they engaged in concerted activities by filing and maintaining a federal law suit against the Respondent.

The complaint alleges by engaging in such conduct, the Respondent caused the termination of Gonzaga's employment in violation of Section 8(a)(1) of the Act, and following his return to work, discharged him because he filed a charge or gave testimony under the Act in violation of Section 8(a)(4) of the Act.

The complaint also alleges that the Respondent discharged Garcia, and further alleges that by reducing the hours and/or pay of Lara and Delgado, the Respondent caused their discharge in violation of Section 8(a)(1) of the Act.

Finally, the complaint, as amended, alleges that the Respondent, by Serafis, threatened and/or impliedly threatened an employee with discharge. Further, the complaint alleges that Serafis gave an employee the choice between cooperating with the Board in the investigation of a charge, or terminating his employment. These allegations clearly relate to Gonzaga.

As set forth above, the main issue to be decided is the Respondent's motivation in reducing the four employees' hours. That motivation is readily seen in Garcia's testimony. As credibly testified by him, Serafis told him that he did not want to see the four employees again, and when asked by Garcia why he did not fire them, Serafis said that he could not discharge them—they had to leave on their own.

I do not credit Serafis' denial of this conversation. What followed clearly shows that it took place. Thus, Garcia credibly testified that he then asked Serafis "if you want me to leave I will leave" and when asked by Serafis when he would leave Garcia said he would leave immediately. Serafis told him to wait until the off-duty counterman could come to replace him.

Thus, Serafis apparently believed that he could not discharge the four employees because it would be obvious that he did so because they filed the FLSA lawsuit. Indeed, what excuse could he give for firing four extremely long-term "excellent" employees?

Accordingly, instead of firing the four employees he embarked on a campaign to first encourage them to leave, and then force them to leave. This is made obvious by his telling the Delgado "you insist on staying here? . . . why you want to stay with this hours . . . if you want to go, go, you don't have to stay . . . cause there's no money for you." And telling Garcia—"why you insist on staying here."

Further proof is seen in the fact that the four employees' hours were reduced in stages. Unable to force them to leave after the first round of reductions, the Respondent reduced their hours once or twice more until they could not afford to remain employed.

For example, Garcia's weekly hours were first reduced from 71 to 50 and then to 33. Lara's hours were lowered first from 40 to 32, then to 20 and then to 8. Delgado's hours were reduced from an average of 73.5 to an average of 58.5 and then to 40. Gonzaga's hours were lowered from 66 to 44, and then to 32. (Upon his being recalled to work, his hours rose to 54).

The Respondent clearly hoped that the four employees would leave after each reduction in their hours. "You insist on staying here . . . why you want to stay with this hours . . . if you want to go, go, you don't have to stay . . . cause there's no money for you."

It is obvious that Serafis made these severe reductions in hours because of his correct belief that he could not lawfully discharge them for filing the lawsuit. Thus he sought to lower their hours and consequently their pay in order to compel them to leave. He was successful in doing so.

In addition, if the Respondent's plan, goal and policy was to reduce all its employees' hours to 40 why did it find it necessary to lower the employees' hours to a point lower than 40: Garcia's hours to 33, and Lara's to 20 and then 8, and Gonzaga's hours to 32?

The answer is obvious. The only reason the Respondent lowered their hours to a point below 40 hours, which was more severe than its original and long-range plan, was to force the employees to resign. It was successful in this endeavor.

In this regard it is quite significant that Lara worked 40 hours per week at the time the FLSA lawsuit was filed. There was thus no apparent need to lower his hours further if the Respondent's plan was to reduce everyone's hours to 40. He was, at that time, already working 40 hours. The fact that his hours were cut back from 40 to 20 and then to 8, was clearly an effort to force him to quit.

In considering the cases of the four employees it must be kept in mind that they were very long term employees who were considered by their supervisors as outstanding: Garcia, nearly 30 years; Lara, 25 years; Delgado, nearly 10 years; and Gonzaga, more than 15 years.

Captan described Garcia and Delgado as "excellent" employees. He termed Gonzaga the best busboy he has ever employed—an "excellent and honest" worker, and as described above, recalled him to work at a higher wage after he quit the first time.

The high regard in which the Respondent held these experienced long-term employees is additional and substantial evidence that they were unlawfully discharged. Captan admitted as such. He told Garcia and Romero on their last days of work that "what happened here was not right" and advised them to speak to their attorneys and pursue the lawsuit against the Respondent.

Accordingly, the Respondent embarked on program to force the four employees to leave. It did so by reducing their hours of work. A decline in their hours of work necessarily caused them to receive less tips. Their wages were increased but their tipped income was lower because they had fewer opportunities to service the restaurant's customers. As a result their total income was lower than it had been before the reductions.

When the first reductions in their hours did not cause them to quit, their hours were reduced about 2 weeks later, and then about 2 weeks after that.

The Respondent correctly states that it increased the weekly wages paid to Garcia, Delgado and Gonzaga as set forth above.[4] It did this in order to comply with the minimum wage laws. It argues that inasmuch as their pay rose, no discrimination took place against them.

The record shows otherwise. For example, Garcia's wages were increased from $120 per week to $240 per week. After the change in late August, he earned about the same in tips and wages as he had before the FLSA lawsuit was filed even though he worked 21 fewer weekly hours. However, in the next proposed change on October 10, when his wages remained at $240 per week, he would have worked only 33 hours and would have earned about $740 per week.

Delgado's wages were increased from $200 per week to $210 per week. However, his hours were reduced from 72–75 per week to 55–62 per week, and thereafter to 40 hours per week, resulting in a loss of total tips and wages from an average of $1070 to $390 per week.

[4] Lara's weekly wages were decreased from $210 to $125 to $60.

Gonzaga's wages were decreased from $150 per week before the lawsuit to $130 per week and then increased to $180 per week thereafter. However, the reduction in his weekly hours from 66 to 44 to 32 before his recall resulted in a decline in his income from an average of $600 per week to $455 per week.

Accordingly, although employees' weekly wages were increased, their total incomes declined because of the reduction in their hours of work. The fact that the Respondent believed that it was forcing them to leave regardless of their increased wages is clearly shown in Serafis' comments to Delgado: "why you want to stay with this, with this hours?" adding "if you want to go, go, you don't have to stay. . . cause there's no money for you."

As set forth above, I have found that the General Counsel has made a prima facie showing that the Respondent was motivated in discharging or constructively discharging the four employees because they filed an FLSA lawsuit against the Respondent.

I have also found that the Respondent has not proven that it would have discharged or constructively discharged them even if they had not filed the lawsuit. The case of Gonzaga, Captan's testimony, and the work records of other employees completely undermine the Respondent's defense.

The Respondent maintained that, following the filing of the FLSA lawsuit it adopted an "across the board" policy of reducing all its employees weekly hours to 40.

As seen above, Gonzaga's hours were reduced in two stages to 32 but then increased to 54 upon his rehire. The Respondent was willing to disregard its policy of a 40-hour week upon its expectation that Gonzaga would withdraw the lawsuit. As noted above, when Captan recalled him to work, he told Gonzaga that he would have to drop the suit.

In addition, the record is replete with instances where kitchen workers' hours were reduced but then restored when it was found that their service was needed. The Respondent admits that it had not reduced all its employees to 40 and does not expect to do so until the end of 2016.

Moreover, and significantly, Captan admitted that the Respondent's records do not show a reduction in the hours of work for the week ending September 7, the first week of the reductions in hours, for any employee other than the four employees. He further significantly stated that for the week ending September 14, the record does not show that any employee other than the four employees and Denise Santos experienced a reduction in their hours.

The above record is hardly a showing that the Respondent had an "across the board" policy of reducing all its employees' weekly hours to 40.

I accordingly find and conclude that the Respondent violated Section 8(a)(1) of the Act by discharging and/or constructively discharging Garcia, Lara and Delgado, and violated Section 8(a)(1) and (4) of the Act in discharging Gonzaga. I further find that it threatened Gonzaga with discharge if he did not withdraw the FLSA lawsuit and the charge filed against the Respondent.

CONCLUSIONS OF LAW

1. The Respondent, Village Red Restaurant Corp. d/b/a/ Waverly Restaurant, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act by discharging Justino Garcia because he filed a Fair Labor Standards Act lawsuit against the Respondent.

3. The Respondent violated Section 8(a)(1) of the Act by constructively discharging Miguel Romero Lara and Jesus Delgado because they filed a Fair Labor Standards Act lawsuit against the Respondent.

4. The Respondent violated Section 8(a) (1) of the Act by discharging Miguel Botello Gonzaga because he filed a Fair Labor Standards Act lawsuit against the Respondent.

5. The Respondent violated Section 8a(1) and (4) of the Act by discharging Miguel Botello Gonzaga because he filed a charge with the National Labor Relations Board against the Respondent.

6. The Respondent violated Section 8(a)(1) of the Act by threatening Miguel Botello Gonzaga with discharge if he did not withdraw the FLSA lawsuit he filed or if he did not withdraw the charge that he filed with the Board.

7. The unfair labor practices set forth above are unfair labor practices affecting commerce within the meaning Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged and/or constructively discharged and refused to reinstate Justino Garcia, Miguel Romero Lara, Jesus Delgado, and Miguel Botello Gonzaga, it must offer them reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed, absent the discrimination against them. Further, I shall recommend that the Respondent make them whole for any loss of earnings and other benefits resulting from their discharges and/or constructive discharges, less any interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses. *King Soopers, Inc.*, 364 NLRB No. 93 (2016).

Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), enf. denied on other grounds sub. nom. *Jackson Hospital Corp. v NLRB*, 647 F.3d 1137 (D.C. Cir. 2011). In accord with *Don Chavas d/b/a Tortillas Dan Chavas*, 361 NLRB 101 (2014), my recommended Order also requires the Respondent to (1) submit the appropriate documentation to the Social Security Administration so that when backpay is paid to the employees, it will be allocated to the appropriate calendar quarters, and/or (2) reimburse them for any additional Federal and State income taxes they may be assessed as a consequence of receiving a lump-sum backpay award covering more than 1 calendar year.

In accordance with the Board's decision in *J. Picini Floor-*

ing, 356 NLRB 11, 15–16 (2010), I shall recommend that the Respondent be required to distribute the attached notice to members and employees electronically, if it is customary for the Respondent to communicate with employees and members in that manner. Also in accordance with that decision, the question as to whether a particular type of electronic notice is appropriate should be resolved at the compliance stage. *J. Picini Flooring*, above, slip op. at 3. See *Teamsters Local 25*, 358 NLRB 54 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Village Red Restaurant Corp. d/b/a Waverly Restaurant, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging and/or constructively discharging employees because they engaged in concerted activities or because they filed a lawsuit pursuant to the Fair Labor Standards Act or because they filed a charge with the National Labor Relations Board.

(b) Threatening its employees with discharge if they did not withdraw the lawsuit they filed pursuant to the Fair Labor Standards Act or if they did not withdraw the charge they filed with the Board.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Justino Garcia, Miguel Romero Lara, Jesus Delgado, and Miguel Botello Gonzaga full reinstatement to their former jobs, or if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Justino Garcia, Miguel Romero Lara, Jesus Delgado, and Miguel Botello Gonzaga whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the Remedy section of the Decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges and/or constructive discharges, and within 3 days thereafter notify Justino Garcia, Miguel Romero Lara, Jesus Delgado, and Miguel Botello Gonzaga in writing that this has been done and that their discharges will not be used against them in any way.

(d) Within 14 days after service by the Region, post at its facility in Bethpage, New York, copies of the attached notice marked "Appendix."[6] Copies of the notice, in English and in Spanish, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 7, 2015.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 31, 2016

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or constructively discharge you because you engaged in concerted activities or because you filed a lawsuit pursuant to the Fair Labor Standards Act or because you filed a charge with the National Labor Relations Board.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT threaten you with discharge if you do not withdraw the lawsuit you filed pursuant to the Fair Labor Standards Act or if you do not withdraw the charge you filed with the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, offer Justino Garcia, Miguel Romero Lara, Jesus Delgado and Miguel Botello Gonzaga full reinstatement to their former jobs, or if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Justino Garcia, Miguel Romero Lara, Jesus Delgado, and Miguel Botello Gonzaga whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against them.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges and/or constructive discharges, and within 3 days thereafter notify Justino Garcia, Miguel Romero Lara, Jesus Delgado, and Miguel Botello Gonzaga in writing that this has been done and that their discharges and/or constructive discharges will not be used against them in any way.

VILLAGE RED RESTAURANT CORP.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/02-CA-162509 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.